KENNETH TEH AH KIAM & CHIN KWAI YOONG

v.

KETUA PENGARAH JABATAN KASTAM & EKSAIS & ORS

FEDERAL COURT, KUALA LUMPUR
ANUAR ZAINAL ABIDIN CJ (MALAYA)
MOHD AZMI FCJ
ZAKARIA YATIM FCJ
[CIVIL APPEAL NO: 01-68-93]
1 DECEMBER 1997

COMPANY LAW: *Receivership - Priorities - Whether federal taxes have priority over debts of debenture-holders - Whether contributions to EPF have priority - Whether Companies Act 1965, ss. 191 & 292 applicable on priority of payment - Whether s. 10 of Government Proceedings Act 1956 gives overall priority to federal taxes - Whether costs and expenses of receivership have priority over federal taxes and contributions to the EPF*

COMPANY LAW: *Charges - Floating charge - Whether goods seized before crystallisation of debentures are part of assets under floating charge*

The appellants were appointed by the debenture-holders as the receivers and managers of Global Pacific Industries Sdn Bhd ('the debtor company') under two debentures. After their appointment, the appellants found that the value of the realisable assets, including the goods that were seized by the Customs Department prior to the crystallisation of the debentures, were insufficient to meet all the claims of the debenture-holders, the Director-General of Customs & Excise, the Employees Provident Fund Board ('EPF') and their own claims of professional fees and expenses in the receivership. The appellants then applied to the High Court for directions under s. 183(3) of the Companies Act 1965 ('the Act') in connection with the priority of payment between the various claimants. The respondents claimed priority of payment under ss. 11 & 65 of the Customs Act 1967 ('the 1967 Act'), ss. 23 & 70 of the Sales Tax Act 1972 ('the Sales Act'), the EPF Act 1991 and s. 10 of the Government Proceedings Act 1956 ('the GP Act'). The appellants, on the contrary, claimed that s. 191 read together with s. 292(1) of the Act, gave priority of payment to their professional fees and expenses of receivership as well as to the debts due to the debenture-holders over the EPF contributions and federal taxes which were in the form of customs duties and sales taxes. The court gave judgment for the respondents and ruled that: (i) customs duties, sales taxes and EPF contributions had priority over the debts due to the debenture-holders and the costs and expenses of the receivers and managers;

(ii) the goods that were seized by the Customs Department under s. 30 of the Sales Act were to be excluded from the assets of the floating charge; (iii) payment to the EPF had first priority while the customs duties and sales taxes were to be paid *pari passu*; and (iv) costs of the application were to be paid from the assets of the debtor company before distribution to the respondents. The appellants appealed against the whole decision of the court.

Held:
Per Mohd Azmi FCJ

[1] Section 292 of the Act prevails on priority of payment in a liquidation situation and s. 191 of the Act is similarly applicable to a receivership situation. It is to be noted that ss. 23, 69 & 70 of the Sales Act have nothing to do with the issue of priority of payment. Section 23 of the Sales Act provides for the recovery of sales tax as a civil debt due to the government. Section 69 & 70 of the Sales Act deal with the duty of liquidators and receivers to notify the Director-General of Customs & Excise of their appointment within fourteen days, and their duty to set aside the sum out of the assets as appears to the Director-General, to be sufficient to provide for any such tax, before disposing of any of the assets. There is nothing in the Sales Act itself to confer the unsecured debts due to the Federal Government any priority of payment. Following the decision in *Director of Customs, Federal Territory v. Ler Cheng Chye*, s. 10 of the GP Act was not applicable and therefore the federal taxes assessed under the Sales Act could not claim overall priority of payment without contravening s. 292(1) priorities.

[2] There is nothing in s. 11 & 65 of the 1967 Act to give priority of payment of customs duties as unsecured debts to the government. Those two sections relate to the powers of the Minister to fix customs duties by orders to be approved by the Dewan Rakyat and the power of the Director-General of Customs to collect taxes in relation to dutiable goods in licensed warehouses. Section 10 of the GP Act would be inapplicable and as such, the priority of payment in respect of federal taxes assessed under any written law must rank in accordance with s. 292(1) of the Act.

[2a] The lower court erred in law in ruling that the customs duties and the sales taxes leviable against the debtor company had priority of payment over not only the debts due to the debenture holders but also over the receiver's costs and expenses. Under s. 292(1) read with s. 191 of the Act, the customs duties and sales tax in the form of federal government taxes would rank sixth in terms of priority of payment to all other unsecured debts.

[3] Section 51 of the EPF Act 1991 deals with the prohibition against the assignment or attachment of EPF contributions. The section has nothing to do with priority of payment in a receivership or liquidation of a company, when there is insufficient funds to meet all claims from the assets of a floating charge under a debenture. There is nothing in the EPF Act 1991 itself to give priority of payment to the EPF.

[3a] In the circumstances, the EPF contributions in the present appeal must fall under s. 292(1)(e) of the Act for the purpose of priority over all other unsecured debts. The order of the lower court should be set aside on the ground that the contributions under the EPF Act 1991 payable by the debtor company did not have priority of payment over the receiver's costs and expenses under s. 292(1) of the Act, although they did have priority of payment over debts due to the debenture holders in respect of principal or interest under the debentures.

[4] On the basis of the *nemo dat rule*, goods that are seized by the Customs Department in satisfaction of sales taxes due to the government prior to the date of appointment of receivers and manager can no longer form part of a floating charge, if the seizure and sale of the goods has been lawfully carried out under s. 30(1) & (2) of the Sales Act. Until the crystallisation of the debentures, the licence given by a debenture-holder to a debtor company to utilise the assets in the floating charge and to meet its legal objection in the ordinary course of business remains without restriction or limitation. Once the goods are lawfully seized, the debenture-holders can no longer be in a position to give any rights in the seized goods to the debtor company. The goods that have actually been seized and physically removed can no longer be part of the assets of the floating charge for distribution by the receivers.

[4a] Accordingly, the lower court was correct in holding that the goods which had been actually seized (even if not yet sold) to meet the sales tax liabilities prior to the date of crystallisation of the debentures would cease to be part of the assets in the floating charge under the debentures. Hence the question of priority of payment did not arise in respect of such goods. In the result, although the argument under s. 10 of the GP Act by the lower court was rejected, part of its finding was agreed to; that the seized goods no longer formed part of the floating charge assets at the commencement of the receivership. Therefore the Customs Department was entitled to the proceeds as of right and not on account of any priority of payment. The remaining goods and other realisable assets in the floating charge would be distributed in accordance with the priorities as set out in ss. 191 & 292(1) of the Act.

[5] All orders made in the lower court were to be set aside except the direction concerning the goods seized from the debtor company by the Customs Department under s. 30 of the Sales Act. The orders set aside were to be substituted with the following ordrs and directions: (i) the customs duties and sales taxes leviable against the debtor company under the GP Act and the Sales Act had no priority of payment over the debt due to the debenture-holder including claims for principal or interest or the costs and expenses incurred by the receivers and managers in the course of receivership; (ii) the EPF contributions payable by the debtor company under EPF Act 1991 had priority over the debenture-holder's claims for principal or interest in respect of the debentures, but they had no priority of payment over the claims for costs and expenses of the receivers and managers; (iii) the EPF contributions payable by the debtor company under the EPF Act 1991 had priority over the customs duties and sales taxes, but limited to the amount due in respect of contributions payable during the twelve months next before the commencement of the receivership as provided under s. 292(1)(e) of the Act; (iv) between the two federal taxes *inter se*, due to insufficient funds to meet the customs duties and sales taxes, they should abate in equal proportions between themselves as provided by s. 292(2) of the Act; (v) the goods seized from the debtor company, prior to the date of crystallisation of the debentures, by the customs department under s. 30 of the Sales Act, shall be excluded from the assets of the floating charge under the debentures, and proceeds from the sale of the said goods should be applied by the Director General of Customs & Excise to meet the sales tax liabilities of the debtor company incurred prior to the date of the commencement of the receivership.

[Appeal allowed in part; each party to pay own costs; cost of application by receivers be paid from assets of debtor company before distribution; deposit refunded to appellants.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Perayu-perayu tersebut telah dilantik oleh pemegang-pemegang debentur sebagai penerima dan pengurus Global Pacifik Industries Sdn Bhd. ('syarikat penghutang itu'), di bawah dua debentur. Selepas perlantikan mereka, perayu-perayu mendapati bahawa nilai aset-aset yang boleh dilangsaikan, termasuk barangan yang dirampas oleh Jabatan Kastam di bawah Akta Cukai Jualan 1972, sebelum pembekuan debentur-debentur, tidak mencukupi untuk memenuhi kesemua tuntutan pemegang-pemegang debentur, Ketua Pengarah Jabatan Kastam & Eksais, Lembaga Kumpulan Wang Simpanan Pekerja ('EPF') dan tuntutan mereka sendiri bagi fee profesyenal dan perbelanjaan

dalam penerimaan tersebut. Perayu-perayu telah memohon kepada Mahkamah Tinggi untuk mendapatkan arahan di bawah s. 183(3) Akta Syarikat 1965 ('Akta tersebut') berhubung dengan keutamaan pembayaran-pembayaran antara pelbagai pihak-pihak menuntut. Responden-responden telah menuntut keutamaan pembayaran di bawah ss. 11 & 65 Akta Kastam 1967 ('Akta 1967 tersebut'), ss. 23 & 70 Akta Cukai Jualan 1972 ('Akta Jualan tersebut'), Akta EPF 1991 dan s. 10 Akta Prosiding Kerajaan 1956 ('Akta GP tersebut'). Perayu-perayu sebaliknya, menuntut bahawa s. 191 yang dibaca bersama dengan s. 292(1) Akta tersebut, memberi keutamaan pembayaran kepada fee profesyenal dan perbelanjaan penerimaan dan juga kepada hutang yang kena dibayar kepada pemegang-pemegang debentur di atas sumbangan-sumbangan EPF dan cukai-cukai persekutuan yang mana adalah dalam bentuk duti kastam dan cukai jualan. Mahkamah telah memberi penghakiman yang memihak kepada responden-responden dan memutuskan bahawa: (i) duti kastam, cukai jualan dan sumbangan EPF mempunyai keutamaan atas hutang yang kena dibayar kepada pemegang-pemegang debentur dan kos serta perbelanjaan penerima-penerima dan pengurus-pengurus; (ii) barangan yang telah dirampas oleh jabatan kastam di bawah s. 30 Akta Jualan hendaklah tidak dimasukkan dalam aset-aset gadaian terapong; (iii) pembayaran kepada Lembaga EPF mempunyai keutamaan pertama dan duti-duti Kastam dan Cukai Jualan hendaklah dibayar *pari passu*; (iv) kos permohonan tersebut hendaklah dibayar daripada aset-aset syarikat penghutang sebelum pengedaran kepada defendan-defendan. Perayu-perayu telah merayu terhadap keseluruhan keputusan mahkamah.

Diputuskan:
Oleh Mohd Azmi HMP

[1] Seksyen 292 Akta tersebut mengatasi pada keutamaan pembayaran dalam suatu situasi likuidasi dan s. 191 Akta tersebut terpakai dengan cara yang sama pada situasi penerimaan. Adalah harus diambil perhatian bahawa s. 23, s. 69 & s. 70 Akta Jualan 1972 tidak mempunyai kaitan dengan isu keutamaan pembayaran. Seksyen 23 memperuntukan perolehan semula cukai jualan sebagai satu hutang sivil yang kena dibayar kepada kerajaan. Seksyen 69 & s. 70 berurusan dengan kewajipan penyelesai dan penerima untuk memberitahu Ketua Pengarah Kastam dan Eksais mengenai perlantikan mereka dalam tempoh empat belas hari, dan kewajipan mereka untuk mengenepikan jumlah daripada aset-aset sepertimana yang diketahui oleh Ketua Pengarah, supaya mencukupi untuk diperuntukkan bagi mana-mana cukai yang sedemikian, sebelum melupuskan mana-mana dari aset-aset itu. Tidak terdapat apa-apa peruntukan dalam Akta Jualan itu sendiri untuk membincangkan hutang-hutang tanpa cagaran yang kena dibayar kepada Kerajaan

Persekutuan sebarang keutamaan pembayaran. Berikutan dengan keputusan dalam *Director of Customs, Federal Territory v. Ler Cheng Chye* s. 10 Akta GP tidak terpakai dan dengan itu cukai-cukai persekutuan yang ditaksirkan di bawah Akta cukai Jualan tidak boleh menuntut keutamaan pembayaran menyeluruh tanpa melanggari keutamaan-keutamaan s. 292(1).

[2] Tidak terdapat apa-apa dalam s. 11 & s. 65 Akta 1967 bagi memberikan keutamaan pembayaran duti-duti kastam sebagai hutang tanpa cagaran kepada kerajaan. Kedua-dua seksyen itu hanya berkaitan dengan kuasa-kuasa Menteri untuk menetapkan duti kastam melalui perintah-perintah yang harus diluluskan oleh Dewan Rakyat dan kuasa Ketua Pengarah Kastam untuk mengutip cukai berhubung dengan barangan-barangan yang boleh dikenakan cukai dalam gudang-gudang berlesen. Seksyen 10 Akta GP akan menjadi tidak boleh dipakai dan oleh yang demikian, keutamaan pembayaran berhubung cukai persekutuan yang ditaksirkan di bawah mana-mana undang-undang bertulis mestilah menurut s. 292(1) Akta tersebut.

[2a] Mahkamah rendah telah tersalah pertimbangan di sisi undang-undang dalam memutuskan bahawa duti-duti kastam dan cukai-cukai jualan yang boleh dikenakan levi terhadap syarikat penghutang mempunyai keutamaan pembayaran ke atas bukan sahaja hutang-hutang yang kena dibayar kepada pemegang-pemegang debentur tetapi juga ke atas kos dan perbelanjaan penerima. Di bawah s. 292(1) yang dibaca bersama-sama s. 191 Akta tersebut, duti-duti kastam dan cukai-cukai jualan dalam bentuk cukai kerajaan persekutuan akan mendapat tempat keenam dalam keutamaan pembayaran berhubung dengan kesemua hutang-hutang tanpa cagaran yang lain.

[3] Seksyen 51 Akta EPF 1991 berurusan dengan larangan terhadap serahhakan atau penahanan sumbangan EPF. Seksyen tersebut tidak ada apa-apa kaitan dengan keutamaan pembayaran dalam penerimaan atau penyelesaian sebuah syarikat, bilamana berlakunya dana yang tidak mencukupi untuk memenuhi kesemua tuntutan daripada aset-aset gadaian terapong di bawah satu debentur. Tidak terdapat apa-apa dalam Akta itu sendiri untuk memberikan keutamaan pembayaran kepada EPF.

[3a] Dalam keadaan yang sedemikian, sumbangan-sumbangan EPF dalam rayuan semasa seharusnya terlingkung di bawah s. 292(1)(e) Akta tersebut bagi tujuan keutamaan yang mengatasi segala hutang-hutang tanpa cagaran yang lain. Perintah mahkamah rendah seharusnya

diketepikan atas alasan bahawa sumbangan-sumbangan di bawah Akta EPF 1991 yang kena dibayar oleh syarikat penghutang tidak mempunyai keutamaan pembayaran yang mengatasi kos dan perbelanjaan penerima di bawah s. 292(1) Akta tersebut, walaupun mereka sesungguhnya mempunyai keutamaan pembayaran yang mengatasi hutang-hutang yang kena dibayar kepada pemegang-pemegang debentur berhubung jumlah pokok atau faedah di bawah debentur-debentur tersebut.

[4] Atas dasar *nemo dat rule*, barangan yang dirampas oleh Jabatan Kastam bagi menjelaskan cukai jualan yang kena dibayar kepada kerajaan sebelum tarikh perlantikan penerima dan pengurus, tidak lagi boleh membentuk sebahagian daripada gadaian terapong, jika rampasan dan penjualan barangan tersebut telah dijalankan secara sah di sisi undang-undang di bawah s. 30(1) dan (2) Akta Jualan. Sehingga pembekuan debentur-debentur tersebut, lesen yang telah diberikan oleh pemegang debentur kepada sebuah syarikat penghutang untuk menggunakan aset-aset dalam gadaian terapong dan untuk memenuhi bantahan undang-undangnya dalam perjalanan perniagaan biasa, kekal tidak terhad atau mempunyai sekatan. Sebaik sahaja barangan-barangan itu dirampas secara sah di sisi undang-undang, pemegang-pemegang debentur itu tidak lagi berada dalam kedudukan untuk memberikan sebarang hak dalam barangan yang dirampas itu kepada syarikat penghutang. Barangan yang telah sebenarnya dirampas dan secara fizikalnya dialihkan tidak lagi boleh menjadi sebahgian daripada aset-aset gadaian terapong untuk pengagihan oleh penerima-penerima.

[4a] Berikutan itu, mahkamah rendah betul dalam memutuskan bahawa barangan yang sebenarnya telah dirampas (walaupun masih belum dijual) bagi menyelesaikan tanggungan cukai jualan sebelum tarikh pembekuan debentur-debentur akan tidak lagi menjadi sebahagian daripada aset-aset dalam gadaian terapong di bawah debentur-debentur tersebut. Dengan itu persoalan keutamaan pembayaran tidak berbangkit berhubung barangan-barangan yang sedemikian. Akibatnya, walaupun penghujahan di bawah s. 10 Akta GP oleh mahkamah rendah ditolak, sebahagian daripada keputusannya telah dipersetujui; bahawa barangan-barangan yang dirampas itu tidak lagi merupakan sebahagian daripada aset-aset gadaian terapong pada permulaan penerimaan tersebut. Dengan itu Jabatan Kastam berhak kepada hasil menurut hak dan bukannya menurut mana-mana keutamaan pembayaran. Barangan yang selebihnya dan aset-aset lain yang boleh dilangsaikan dalam gadaian terapong itu akan diedarkan menurut keutamaan-keutamaan sepertimana yang dibentangkan dalam s. 191 dan s. 292(1) Akta tersebut.

[5] Kesemua perintah-perintah yang dibuat dalam mahkamah rendah haruslah diketepikan melainkan arahan berhubung barangan yang dirampas daripada syarikat penghutang oleh jabatan kastam di bawah s. 30 Akta Cukai Jualan. Perintah-perintah yang diketepikan hendaklah digantikan dengan perintah-perintah dan arahan-arahan yang berikut: (i) Duti kastam dan cukai jualan yang boleh dilevikan terhadap penghutang di bawah Akta GP dan Akta Jualan tidak mempunyai keutamaan pembayaran yang mengatasi hutang yang kena dibayar kepada pemegang debentur termasuk tuntutan bagi jumlah pokok atau faedah atau kos dan perbelanjaan yang dialami oleh penerima dan pengurus dalam perjalanan penerimaan tersebut; (ii) sumbangan EPF yang kena dibayar oleh syarikat penghutang di bawah Akta EPF 1991 mempunyai keutamaan yang mengatasi tuntutan pemegang debentur untuk jumlah pokok atau faedah berhubung dengan debentur-debentur; tetapi mereka tidak mempunyai keutamaan pembayaran ke atas tuntutan bagi kos dan perbelanjaan penerima-penerima dan pengurus-pengurus; (iii) Sumbangan EPF yang kena dibayar oleh syarikat penghutang di bawah Akta EPF 1991 mempunyai keutamaan mentagai duti kastam dan cukai jualan, tetapi terhad kepada jumlah yang kena dibayar berhubung sumbangan yang kena dibayar dalam tempoh dua belas bulan yang akan datang sebelum permulaan penerimaan sepertimana yang diperuntukkan di bawah s. 292(1)(e) Akta tersebut; (iv) Antara kedua-dua cukai persekutuan *inter se*, disebabkan oleh dana yang tidak mencukupi untuk memenuhi duti kastam dan cukai jualan, ia seharusnya dikurangkan menurut bahagian-bahagian yang sama antara mereka sepertimana yang diperuntukkan oleh s. 292(1) Akta tersebut; (v) Barangan yang dirampas daripada syarikat penghutang, sebelum tarikh pembekuan debentur, oleh jabatan kastam di bawah s. 30 Akta jualan tersebut, akan dikeluarkan daripada aset-aset gadaian terapong di bawah debentur itu, dan hasil daripada jualan barangan tersebut, seharusnya dipohon oleh Ketua Pengarah Kastam dan Eksais untuk memenuhi tanggungan cukai jualan syarikat penghutang yang dialami sebelum tarikh permulaan penerimaan.

[Rayuan dibenarkan sebahagiannya; setiap satu pihak dikehendaki membayar kosnya yang tersendiri; kos permohonan oleh penerima hendaklah dibayar daripada aset-aset syarikat penghutang sebelum diagihkan; deposit dibayar balik kepada perayu.]

Cases referred to:

Abdul Samad bin Hj Alias v. The Government of Malaysia & Ors [1996] 4 CLJ 123 ***(refd)***

Anuarul Aini & Anor v. Ketua Pengarah Kastam & Eksais DiRaja Malaysia Johore Bahru [1991] 1 CLJ 495 ***(refd)***

Chuah Teong Hooi & Anor v. EPF Board [1990] 2 CLJ 44 ***(not foll)***

Croshaw v. Lyndhurst Ship Company [1897] 2 Ch 154 ***(cit)***

Director of Customs, Federal Territory v. Ler Cheng Chye (Liquidator of Castwell Sdn Bhd in Liquidation) [1995] 3 CLJ 316 ***(foll)***

Public Finance Bhd v. Scotch Leasing (In Receivership) (Perwira Habib Bank Malaysia, Intervener) [1996] 3 CLJ 635 ***(foll)***

Robson v. Smith [1985] 2 Ch 118 ***(cit)***

Legislation referred to:

Companies Act 1965, ss. 183(3), 191, 292(1)
Customs Act 1967, ss. 11, 65
Employees Provident Fund Act 1991, ss. 51, 65, 66
Government Proceedings Act, 1956, s. 10
Sales Tax Act 1972, ss. 23, 30(1), (2), 69, 70

[Appeal from High Court Malaya, Kuala Lumpur; Originating Summons No: R2-24-115-92]

For the appellants - Izabella De Silva; M/s Raja, Darryl & Loh
For the 1st & 2nd respondents - Allaudeen Ismail, SFC
For the 3rd respondent - Dr Das; M/s Shook Lin & Bok

JUDGMENT

Mohd Azmi FCJ:

This appeal involves another dispute concerning priority of payment between competing claims faced by the receivers and managers of a company in receivership under the Companies Act 1965. Mr Kenneth Teh Ah Kiam and Mr Chin Kwai Yoong (the appellants/plaintiffs) were appointed on 16 March 1992 under two debentures secured by a floating charge by the Hongkong and Shanghai Banking Corporation Limited and the Pacific Bank Berhad (the debenture holders) as receivers and managers of Global Pacific Industries Sdn Bhd. (hereinafter referred to as "the debtor company"). After their appointment, they discovered as is often the case in a receivership, that the value of realisable assets in their hands including the value of goods seized by the Customs Department under the Sales Tax Act 1972 prior to the date of crystallization of the debentures, were insufficient to meet all the claims of not only the debenture holders, but also the Director-General of Customs & Excise, the Employees Provident Fund Board and their own claims of professional fees and expenses incurred in the receivership. As at July 1992,

the estimated realisable assets of the debtor company in their hands was in the region of RM11,248,000 which consisted of:

(i) the sum of RM10,222,000 being estimated sum realisable from fixed assets, ie, fixed charge assets, and

(ii) the sum of RM1,026,000 being the estimated sum realisable from assets subject to the floating charge under the debentures.

By para. 7 of their joint-affidavit, Mr. Kenneth Teh and Mr. Chin deposed that there were insufficient funds from the assets of the debtor company to pay all the claims alleged by the respondents/defendants "from the floating charge under the debentures". The claims according to para. 4 were as follows:

(a) the sum of RM122,388.79 claimed by the Director-General Customs & Excise being the customs duties leviable;

(b) the sum of RM972,338.06 claimed by the Director-General of Customs & Excise being the sales tax leviable; and

(c) the sum of RM835,600 claimed by the Employees Provident Fund Board being the employees' provident fund contributions payable.

As at 31 October 1992 the amount due to the two debenture holders were RM4,989,710.69 (Hongkong & Shanghai Banking Corporation Ltd.) and RM6,291,809.03 (Pacific Bank Berhad) – totalling RM11,281,519.72 which far exceeded the sum of RM1,026,000 realisable from the assets subject to the floating charge. The respondents/defendants have claimed priority of payment not only under the relevant provisions of the Customs Act 1967, the Sales Tax 1972 and the Employees Provident Fund Act 1991, but also under s. 10 Government Proceeding Act 1956. On the contrary, the appellants/plaintiffs relied on s. 191 read together with s. 292(1) the Companies Act 1965, to claim for higher priorities for their own professional costs and expenses of receivership and as well debts due to the debenture holders, as compared to EPF contributions, and federal taxes in the form of sales tax and customs duties, which ranked second last and last respectively.

It was under these bleak financial circumstances that the receivers and managers applied to the High Court by Originating Summons dated 29 December 1992 for directions under s. 183(3) of the Companies Act in connection with priority of payment between the various claimants, which may be summarised as follows:

(1) whether customs duties leviable against the debtor company under the Customs Act 1967, in particular ss. 11 and 65 have priority of payment over:

(a) debts due to the debenture holders including claims for principal and interests;

(b) cost and expenses incurred by receivers and managers in the course of receivership.

(2) whether sales tax leviable against the debtor company under the Sales Tax Act 1972, in particular ss. 23 and 70, have priority of payment over the debts due to the debenture holders, and the receivers and managers as stated in paras. (1)(a) and (1)(b) above.

(3) whether Employees Provident Fund (EPF) contributors payable by the debtor company under EPF Act 1991, in particular ss. 51 and 65, have priority of payment over the debts due to the debenture holders and the receivers and managers as stated in paras. (1)(a) and (1)(b) above.

(4) In the event that the court does hold under paras. (1)(2) and (3) that the customs duties, sales taxes and EPF contributions have priorities over the debts due to the debenture holders and to the receivers and managers, which of the said customs duties, sales taxes and EPF provident fund contributions leviable rank in priority and their ranking of the same *vis-a-vis* one another.

(5) For other consequential directions and orders.

On 1 November 1993, Wan Adnan J (as he then was), gave judgment for the defendants when he made various declaratory orders to the effect that customs duties and sales taxes, and as well as EPF contributions payable by the debtor company had priorities over the debts due to the debenture holders and to the receivers and managers' costs and expenses.

On the issue of goods of the debtor company that had been seized by the Customs Department under s. 30 of the Sales Tax Act 1972 on account of sales taxes, the learned judge declared that they should be excluded from the assets of the floating charge and the proceed of sale of such goods be paid to meet the sales tax liability of the debtor company under the said Act.

As regards priorities between the defendants *inter se* the learned judge ordered priority of payment be given to the EPF Board, and priority between the two federal taxes – the customs duties and sales taxes be paid *pari passu.*

The learned judge also ordered the costs of application be paid from the assets of the debtor company before distribution to the defendants according to the decreed priorities. Mr. Kenneth Teh and Mr. Chin are dissatisfied with the whole decision of the learned judge and have appealed to this court.

Now dealing first with the priority of payment ordered by the learned judge in favour of the sales tax over the debts due to the debenture holders and as well the receivers and manager's costs and expenses, it is clear from the grounds of judgment of the learned judge dated 23 May 1994 that His Lordship was merely following as he was bound to do, the then current decision of the High Court in *Anuarul Aini & Anor. v. Ketua Pengarah Kastam & Eksais DiRaja Malaysia Johore Bahru* [1991] 1 CLJ 495 which had then gone up to the then Supreme Court on appeal and summarily upheld. In that case, it was the opinion of James Foong JC (as he then was) that s. 10 of the Government Proceedings Act 1956 would give the Customs Department the right to an overall priority of payment, as the sales tax in question was incurred before the crystallization of the debenture and as such constituted a debt due to government within the meaning of s. 10 which provides:

> (1) All debts due and claims owing from time to time by any person to the Government, whether upon judgment, bond, or other specialty, or upon simple contract or otherwise, shall be entitled from the date of the accrual thereof, respectively, to a preference of payment over all debts or claims of every kind which shall, subsequent to such date, have been contracted or incurred by or become due from such person to any other person whomsoever.
>
> (2) Nothing herein contained shall affect any right vested in any person by virtue of a mortgage or charge of immovable property duly registered in the manner provided by law for the registration of such mortgage or charge.

In other words, it was held in *Anuarul Aini* case that the ranking of the priorities given by s. 191 read with s. 292(1) of the Companies Act 1965 to certain debts over all other unsecured debts, must give way to the priority of government debts conferred by s. 10, Government Proceedings Act 1956. However, much water has passed under the bridge since *Anuarul Aini* was upheld summarily by the then Supreme Court. His Lordship Wan Adnan, FCJ subsequently sitting in the Federal Court, has had the opportunity to review the legal effect of the inter-play between the two legislations on the issue of priority of payment in a receivership situation in the case of *Abdul Samad bin Haji Alias v. The Government of Malaysia & Ors.* [1996] 4 CLJ 123, wherein this court followed its earlier decision in *Director of Customs, Federal Territory v. Ler Cheng Chye (Liquidator of Castwell Sdn. Bhd. in Liquidation)* [1995] 3 CLJ 316 where it was laid down by Wan Yahya FCJ that, when a company is in liquidation, federal taxes under the Sales Tax Act 1972, do not have overall priority of payments purely on the basis of s. 10 of the Government Proceedings Act 1956 in disregard of the special and specific provision on priorities under s. 292(1) of the Companies Act 1965. It also

held that s. 69 of the Sales Tax Act had nothing to do with priority of payment in companies' liquidation. The following headnotes of MLJ in *Ler Cheng Chye* at p. 600 adopted by *Abdul Samad* would be useful:

(1) In terms of its construction, s. 69 of the Sales Tax Act is directive in nature and merely directs the setting aside of moneys sufficient for taxation, but does not provide that Government debts shall rank in priority to all other secured debts. If the Legislature had intended otherwise, it would have conferred that privilege in clear and unequivocal words. The proper provisions to apply in deciding the priority of payments in respect of the sales tax debt are ss. 291 and 292 of the Companies Act.

(2) Section 10(1) of the Government Proceedings Act provides in general terms that all debts due to the Government shall enjoy preferential payments over other competing debts which arise subsequently. In contrast, ss. 291 and 292 of the Companies Act are special provisions dealing with the respective rights of secured and unsecured creditors in an insolvent company, and they expressly rank federal tax sixth in priority amongst other unsecured debts. When the floating charge crystallized, the debenture holders became secured creditors, whereas the sales tax claim by the Customs remained an unsecured civil debt.

(3) Discernibly, there is a conflict between s. 292(1) and s. 10(1). In this situation, the general rule of construction that applies is *specialia generalibus derogant* – special provisions derogate from general provisions. Hence, if a special provision is in conflict with an earlier general provision, the special provision will be treated as an exception to the general provision, and it follows that s. 292(1) of the Companies Act must be read as an exception to the general provision of s. 10(1) of the Government Proceedings Act.

(4) In the present appeal, this intention was made even clearer by s. 213 of the Companies Act, which expressly binds the Government to the priority of debts as provided in the Companies Act. Also, if the Government debts are to be paid in preference of the cost and expense of winding up, and if the funds available are limited, no winding up can be proceeded with, as there will be no funds to pay even for the filing fees of the petition and the liquidator's fee.

The principle on priority of payment in *Ler Cheng Chye* was thus extended and applied to a receivership situation by *Abdul Samad* by virtue of s. 191 read together with s. 292 of the Companies Act which provided:

Payments of certain debts out of assets subject to floating charge in priority to claims under charge.

191(1) Where a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge or possession is taken by or on behalf of debenture holders of any property comprised in or subject to a floating charge, then if the company is not at the time in the course of being wound up, debts which in every winding up are preferential debts and are due by way of wages salary vacation leave or superannuation or provident fund payments and any amount which in a winding up is payable in pursuance of s. 292(3) or (5) shall be paid out of any assets coming to the hands of the receiver or other person taking possession in priority to any claim for principal or interest in respect of the debentures and shall be paid in the same order of priority as is prescribed by that section in respect of those debts and amounts.

(2) For the purpose of sub-s. (1) the references in s. 292(1)(b), (c), (d) and (e) to the commencement of the winding up shall be read as a reference to the date of the appointment of the receiver or of possession being taken as aforesaid (as the case requires).

(3) Any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors.

Priorities

292(1) Subject to this Act, in a winding up there shall be paid in priority to all other unsecured debts –

(a) firstly, the costs and expenses of the winding up including the taxed costs of a petitioner payable under s. 220, the remuneration of the liquidator and the costs of any audit carried out pursuant to s. 281;

(b) secondly, all wages or salary (whether or not earned wholly or in part by way of commission) including any amount payable by way of allowance or reimbursement under any contract of employment or award or agreement regulating conditions of employment, of any employee, not exceeding one thousand five hundred ringgit or such other amount as may be prescribed from time to time whether for time or piecework in respect of services rendered by him to the company within a period of four months before the commencement of the winding up;

(c) thirdly, all amounts due in respect of worker's compensation under any written law relating to worker's compensation accrued before the commencement of the winding up;

(d) fourthly, all remuneration payable to any employee in respect of vacation leave, or in the case of his death to any other person in his right, accrued in respect of any period before the commencement of the winding up;

(e) fifthly, all amounts due in respect of contributions payable during the twelve months next before the commencement of the winding up by the company as the employer of any person under any written law relating to employees superannuation or provident funds or under any scheme of superannuation or retirement benefit which is an approved scheme under the federal law relating to income tax; and

(f) sixthly, the amount of all federal tax assessed under any written law before the date of the commencement of the winding up or assessed at any time before the time fixed for the proving of debts has expired.

(2) The debts in each class specified in sub-s. (1) shall rank in the order therein specified but as between debts of the same class shall rank equally between themselves, and shall be paid in full, unless the property of the company is insufficient to meet them, in which case they shall abate in equal proportions between themselves.

It is also convenient to reproduce the following relevant headnotes No. (1), (2), (3) and (4) of *Abdul Samad* at p. 582 [1996] 3 MLJ:

(1) It must now be regarded as settled law that ss. 69 and 70 of the Sales Tax Act 1972 do not operate to confer any priority for sales tax over other debts and that s. 292(1) of the Companies Act 1965 must be read as an exception to the general provisions of s. 10(1) of the Government Proceedings Act 1956; *Director of Customs, Federal Territory v. Ler Cheng Chye (Liquidator of Castwell Sdn. Bhd., in liquidation)* [1995] 3 CLJ 316 followed.

(2) It is erroneous to say that the provisions of ss. 191 and 292 of the Companies Act 1965 do not apply. Once a receiver has been appointed, ss. 191 and 292 will come into play. Whilst it is true that a taxable person collects the sales tax for the Government, the Government cannot claim priority over such monies once a receiver has been appointed. The argument will be tenable only if the monies collected by Rajiv as sales tax were put into a separate special account. But there is no evidence that monies collected as sales tax were put into such an account. They must have been put into the mixed account of Rajiv.

(3) Therefore, the trial judge was wrong in directing that sales tax due to the government be paid in priority to the claim of the debenture holder.

(4) Since the claim by the employees for the sum of RM21,000 was agreed to by the appellant, there was therefore no dispute between the appellant and the employees that the employees were entitled to be paid that sum in priority to the claim of the debenture holder. But the employees are only entitled to be paid out of floating charge realisations and not out of fixed charge realisations.

Encik Allaudeen Ismail, Senior Federal Council appearing for the Ketua Pengarah Jabatan Kastam & Eksais (Director General of Customs & Excise) and the Federal Government, conceded in his submission that the appeal should be allowed in so far as s. 10 argument for priority of federal taxes is concerned based on the authority of this court in *Abdul Samad.* We are similarly of the opinion that there is no valid reason to reconsider *Ler Cheng Chye* or *Abdul Samad* on the inter-play between s. 10 Government Proceedings Act and s. 292 Companies Act. The latter provision must necessarily prevail on priority of payment in a liquidation situation, and the same applied to a receivership situation by virtue of s. 191 of the Companies Act. Nor are we persuaded by the feeble attempt to review this Court's interpretation of ss. 23, 69 and 70 of the Sales Tax 1972. It should be noted that the three sections mentioned by Mr. Kenneth Teh and Mr. Chin in their application for directions have nothing at all to do with the issue of priority of payment. Section 23 merely provides for the recovery of sales tax as a civil debt due to the Government, whilst ss. 69 and 70 deal with the duty of liquidators and receivers to notify the Director-General of Customs and Excise of their appointment within 14 days and also the duty before disposing of any of the assets to set aside such sum out of the assets as appears to the Director-General to be sufficient to provide for any such tax. Thus, unless s. 10 of the Government Proceedings Act 1956 is successfully brought into operation, there is nothing in the Sales Tax Act itself to confer the unsecured debts due to the federal government any priority of payment. Since it is conceded that s. 10 of the 1956 Act has no application, federal tax assessed under the Sales Tax Act cannot claim overall priority of payment without contravening s. 292(1) priorities.

Similarly, there is nothing in ss. 11 and 65 of the Customs Act 1967 to give priority of payment of customs duties as unsecured debts to the government. The two sections mentioned by Mr. Kenneth Teh and Mr. Chin, merely relate to the power of the Minister to fix customs duties by orders to be approved by the Dewan Rakyat, and the power of the Director-General of Customs to collect taxes in relation to dutiable goods, in licensed warehouses. Again, the inability to invoke s. 10 of the Government Proceedings Act would cripple the respondent's case. As such, the priority of payment in respect of federal taxes assessed under any written law must rank in accordance with s. 292(1) of the Companies Act.

In the circumstances, the learned trial judge in the court below erred in law in directing the customs duties and the sales taxes leviable against the debtor company to have priority of payment over not only the debts due to the debenture holders, but also over the receiver's costs and expenses. Under s. 292(1) read with s. 191 the Companies Act, the customs duties and sales taxes in the form of federal government taxes would rank sixth in terms of priority of payment to all other unsecured debts.

The next question is the contributions under the Employees Provident Fund Act 1991, payable by the debtor company, which the learned judge ordered to have priority over the debts due to the debenture holders, and also over the costs and expenses of the receivers and managers. In making this order, the learned judge had relied specifically on his own judgment in *Chuah Teong Hooi & Anor. v. EPF Board* [1990] 2 CLJ 44. In that case it was argued for the receivers and managers that although claim by the EPF Board admittedly ranked in priority to the claim of the debenture holders, the receiver's costs and expenses had an overall priority. Wan Adnan J (as he then was) rejected the receivers' claim to priority as regards their costs and expenses, and on appeal to the then Supreme Court, the decision was summarily upheld. In argument Ms. Isabella refers to ss. 51, 65 and 66 of the Employees Provident Fund Act 1991, and whilst agreeing to the social nature of the legislation in the protection of workers' rights, she argued that s. 292(1) of the Companies Act expressly allows the EPF Board priority for only 12 months contributions. Mr. Das for the EPF Board, argued that employers contributions under the EPF Act should be excluded from the priority under s. 292(1) para. (a), on the basis of s. 51 of the Act which provides:

Contributions and deposits not to be assigned or attached

51. Notwithstanding anything to the contrary contained in any other written law:

(a) no sum deducted from the wages of a member of the Fund under s. 48;

(b) no amount payable by the employer as his contribution; and

(c) no amount standing to the credit of a member of the Fund,

shall be assignable, transferable, liable to be attached, sequestered, levied upon, for, or in respect of, any debt or claim whatsoever, nor shall the Official Assignee be entitled to or have any claim on any such sum or amount:

In our view, s. 51 merely deals with the prohibition against assignment or attachment of EPF contributions and it has nothing to do with priority of payment in a receivership or liquidation of a company, when there is

insufficient fund to meet all claims from the assets of a floating charge under a debenture. As in the case of the Customs Act and the Sales Tax Act, there is nothing in the EPF Act itself to give priority of payment to the EPF Board. On the contrary, s. 191(1) Companies Act 1965 itself confers priority to EPF contributions payable by the employer over any claim of the debenture holders for principal or interest, as was conceded by both parties in *Chuah Teong Hooi.* In the circumstances, the EPF contributions in the present appeal must necessarily fall under s. 292(1)(e) Companies Act for purpose of priority over all other unsecured debts, in the event such as at present, where there is insufficiency of realisable assets in the floating charge to meet all claims. We do not accept Mr. Das' argument that contributions under the EPF Act should be excluded from the priorities enacted in s. 292(1). Since EPF contributions are expressly included for priority purposes under s. 191(1), there is no reason why such contributions, should be excluded, from s. 292(1) unless expressly so provided by Parliament. In the circumstances, as far as the claim of the EPF Board is concerned, we agree that the order of the learned judge in the court below should be set aside on the ground that the contributions under the EPF Act payable by the debtor company do not have priority over the receiver's costs and expenses under s. 292(1) Companies Act, although they do have priority of payment over debts due to the debenture holders in respect of principal or interest under the debentures.

As it is our conclusion that customs duties, sales taxes and EPF contributions do not have priority of payment over receivers costs and expenses, and only the EPF contributions have priority over claims of the debenture holders, the fourth direction sought by Mr. Kenneth Teh and Mr. Chin in their originating summons would not arise.

One distinct feature in this appeal is the fact that the assets in the floating charge which the debenture holders are claiming also include those that have been lawfully seized by the customs department under s. 30 of the Sales Tax 1972, prior to the crystallization of the debentures on 16 March 1992, viz. the date on which the receivers and managers were appointed by the debenture-holders. It was not seriously disputed that the goods were seized during three separate occasions on 6 and 8 March 1992, and 10 March 1993. The learned judge in his grounds of judgment had referred to various authorities to support his finding that such goods, having been seized prior to the date of crystallization towards payment of sales tax would cease to be part of the assets in the floating charge on the date of crystallization of the debentures (see judgment of Romer J in *Robson v. Smith* [1985] 2 Ch. 118). According to authorities, even if the seized goods or some of them had not been sold when the receivers made their claim, as is contended in the present case, the

court would have the discretion, in the absence of special circumstances, to allow the sale of the goods to be proceeded with (see *Croshaw v. Lyndhurst Ship Company* [1897] 2 Ch. 154).

In a similar argument raised in *Public Finance Bhd. v. Scotch Leasing (In Receivership) (Perwira Habib Bank Malaysia, Intervener)* [1996] 2 MLJ 369, Peh Swee Chin, FCJ delivering the judgment of the Federal Court said at pp. 381-2:

> When the debenture was executed by the leasing company on 11 June 1985, the undisputed assignments of the 21 leasing agreements had taken place on various dates in 1983 and 1984, so that applying the *nemo dat* rule, the floating charge created by the execution of the debenture could not cover the book debts in respect of the 21 leasing agreements for there was nothing left then in regard to the 21 agreements for the floating charge to cover.
>
> Likewise, when the floating charge was crystalized on 28 October 1986 on the appointment of a receiver and manager, the debenture holder did not obtain a fixed charge over the same debts in these 21 leasing agreements, for there could be no fixed charge on some assets which the leasing company had parted to somebody else earlier, the assignee.

On the basis of the *Nemo Dat Rule* the goods seized by the customs department in satisfaction of sales taxes due to government prior to the date of appointment of the receivers and managers, could no longer form part of the floating charge, if the seizure and sale of the goods had been lawfully carried out under ss. 30(1) and (2) of the Sales Tax Act. Until crystallization of the debentures, the licence given by the debenture holders to the debtor company to utilize the assets in the floating charge and meet its legal objection in the ordinary course of business, remains without restriction or limitation. Hence, once the goods were lawfully seized, the debenture holders could no longer be in a position to give any rights in the seized goods to the debtor company as part of the assets under the floating charge. Since they were no longer capable of conferring any licence in the goods to the debtor company once the goods had actually been seized and physically removed, such goods or the proceeds thereof can no longer be part of the assets of the floating charge for distribution by the receivers.

We accordingly agree with the learned trial judge that the goods which had been actually seized (even if not yet sold) to meet sales tax liabilities prior to the date of crystallization of the debentures, would cease to be part of the assets in the floating charge under the debentures for purpose of distribution by the receivers. As such, the question of priority of payment does not really arise in respect of such goods. In the result, although we reject the argument under s. 10 Government Proceedings Act as the basis of the learned judge's

conclusion, we agree for different reason with that part of his findings that the seized goods no longer formed part of the floating charge assets at the commencement of the receivership, and therefore the customs department was entitled to them or their proceeds as of right and not on account of any priority of payment. In the circumstances, apart from the goods which had been seized by the customs department, the remaining goods and other realisable assets in the floating charge must be distributed in accordance with the priorities as set out in ss. 191 and 292(1) of the Companies Act.

We therefore allow this appeal in part. We set aside all the orders made by the court below except the direction of the learned judge concerning the goods seized from the debtor company by the customs department under s. 30 of the Sales Tax Act, which was ordered to be excluded from the assets in the floating charge. The orders set aside are substituted with the following orders and directions:

(1) Customs duties and sales taxes leviable against the debtor company under the Customs Act 1967, and the Sales Tax Act 1972 respectively have no priority of payment over either:

(a) debt due to the debenture holders including claims for principal or interest; or

(b) costs and expenses incurred by the receivers and managers in the course of receivership;

(2) Employees Provident Fund contributions payable by the debtor company under EPF Act 1991 have priority over the debenture-holders' claims for principal or interest in respect of the debentures, but they have no priority of payment over their claims for costs and expenses of the receivers and managers.

(3) The Employees Provident Fund contributions payable by the debtor company under the EPF Act 1991, have priority over customs duties and sales taxes, but limited to the amounts due in respect of contributions payable during the twelve months next before the commencement of the receivership as provided under s. 292(1)(e).

(4) As regards priority between the two federal taxes *inter se*, due to insufficient funds to meet the customs duties and sales taxes, they shall abate in equal proportions between themselves as provided by s. 292(2) of the Companies Act.

(5) The goods seized from the debtor company, prior to the date of crystallization of the debentures, by the customs department under s. 30 of the Sales Tax Act 1972, shall be excluded from the assets of the floating charge under the debentures, and proceeds from the sale of the

said goods, shall be applied by the Director-General of Customs & Excise to meet the sale tax liabilities of the debtor company incurred prior to the date of commencement of the receivership.

As regards costs, we order that each party in the proceedings should pay its own costs both here and in the court below. The costs of the application by the receivers be paid from the assets of the debtor company before distribution, and the deposit shall be refunded to the appellants.

Reported by Anne Soh

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